Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears, 005617
P.O. Box 4080
Prescott, Arizona 86302
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Div. 6 **MOTION FOR DISMISSAL OF DEATH QUALIFIED JURY** (Expedited Oral Argument Requested)

Defendant, Steven DeMocker, by and through undersigned counsel, hereby requests that this Court dismiss the death qualified jury and call a new venire panel for voir dire on the new non-capital charges.

This motion is based upon Mr. DeMocker's rights to due process, equal protection, counsel, a fair trial and appeal, freedom from double jeopardy, and freedom

from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under the Arizona Constitution, Article 2, Sections 1, 2, 3, 4, 8, 10, 11, 13, 15, 24, 32 and 33, as well as the authorities cited in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Steven DeMocker was charged with the murder of Carol Kennedy in October of 2008. In May of 2009, this Court ordered that the trial date be set for May, 2010. Individual voir dire in the case began on May 4, 2010 and a pool of 40 jurors adjudicated by the Court as capitally qualified was developed by May 23, 2010. Voir dire was focused almost entirely on the capital nature of the trial. Jurors who were excused for cause, were excused by the Court based solely on their position on the death penalty in accordance with *Witherspoon v. Illinois*. On May 26, 2010 the State moved to dismiss the death penalty without explanation. This Court should dismiss this capitally qualified jury pool and commence a new voir dire process on the new non-capital charges.

1. Capital Qualification Creates a Biased, Conviction Prone Jury

Both the United States and Arizona Constitutions require that a defendant be tried to an *impartial* jury. U.S. Const., Sixth Amendment; Ariz. Const. Art. II, Section 24. Indeed, the right to an impartial jury is fundamental and deeply embedded in American jurisprudence. In *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), the Supreme Court stated that, "[t]he constitutional standard of fairness requires that a defendant have 'a panel of impartial, 'indifferent' jurors.' " (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)).

The process of capital jury selection, itself, produces the most unqualified possible group of jurors precisely when a criminal defendant should have a right to the

most qualified jurors. The studies demonstrate that the process negatively impacts the guilt/innocence phase of a trial in several ways.

First, by questioning potential jurors extensively about their attitudes toward the death penalty, substantial numbers of jurors believe both that the defendant must be guilty, and that apparently they are going to be asked to sentence him to death. Many jurors believe that the subtext of a capital trial voir dire is not about whether the defendant committed the murder, it is about what punishment he should receive. Moreover, many jurors, after seeing which jurors stay and which leave, believe that if selected, it is understood that they will find the defendant guilty, and that they will sentence him or her to death.[1]

In addition to the bias toward guilty verdicts and death sentences, death-qualifying voir dire results in the least representative jury criminal defendants face. Early studies which have been validated by the Capital Jury Project (CJP) established rather obvious phenomena. People's attitudes toward capital punishment do not exist in a vacuum. One's attitudes about this very controversial topic, over which Americans have very divergent views, are strongly associated with a whole constellation of attitudes about the criminal justice system. These studies established, for instance, that people who support the death penalty — and who not only support it, but are able to tell the lawyers and the judge in the courtroom that they would be able to impose it — hold a number of other views about the criminal justice system that work unfairly against the capital defendant.

The data demonstrates that these jurors, much more strongly than non-death-qualified jurors, believe that if a defendant does not testify in his or her own defense, that the failure to do so is affirmative proof of guilt. Death-qualified jurors do not

[1] See, e.g , Apps. P, Q and R to Defendant's Motion to Declare Death Qualification of Jury Unconstitutional. All citations to Apps are from the Motion to Declare Death Qualification of Jury Unconstitutional.

believe in the presumption of innocence. They believe much more strongly that "where there is smoke, there is fire." They are extremely distrustful of defense lawyers and view everything they have to say with a great deal of skepticism. On the other hand, they are extremely receptive to the prosecution and its witnesses — especially police officers — and believe them.

They do not believe in Due Process guarantees, such as requiring the prosecution to bear the burden of proof beyond a reasonable doubt. They are highly suspicious of experts called by the defense. In short, death qualified jurors are the jurors least representative of the community as a whole and are the jurors least likely to give a criminal defendant the benefit of the doubt.[2]

Recent research suggests that juror-eligible citizens who are excluded by either *Witherspoon* or *Witt* are less susceptible to pretrial publicity,[3] less persuaded by ambiguous expert scientific testimony[4] and more likely to find non-statutory mitigating factors[5] than persons found qualified to serve as capital jurors.

The conviction proneness of a death-qualified jury is recognized by the Arizona Supreme Court:

> [W]e must also acknowledge defendant's contention that removal of all jurors opposed to the death penalty but willing to set aside their views might produce a jury 'organized to return a verdict' of guilt.

State v. Anderson, 197 Ariz. 314, 320, 4 P.3d 369, 375 (2000).

The jurors in this case verified these findings. The Court and counsel heard from many jurors (some of whom were qualified over defense objections) who indicated that they would be more likely to vote for the death penalty to avoid the imposition of a life sentence with possibility of parole, that they would be concerned about why the

---

[2] Apps. S and T
[3] Apps. FFF and GGG
[4] Apps. FFF and III.
[5] Apps. FFF and HHH.

defendant may choose not to testify and that they would tend to give more credibility to law enforcement witnesses.

Counsel reviewed the over 300 initial questionnaires and created a list of 142 people that were recommended for cause challenges primarily because of their views on the death penalty. While the State initially resisted this process, eventually the State and the defense excused a large number of jurors with little or no voir dire based entirely on their anti-death penalty views. For the most part, any person whose questionnaire expressed a refusal to impose the death penalty was excused without ever being questioned in individual voir dire. The State pushed for excusals for those that appeared to be *Withrespoon* excludable on the paper alone. This process has resulted in a jury pool infected in the ways described by the Capital Jury Project and conviction prone as acknowledged by the Arizona Supreme Court.

2. Use of this Capitally Qualified Jury Pool Will Result in Jury Confusion

Jurors in Arizona and across the country are routinely instructed to avoid extraneous information. We hope in most cases jurors will be able to follow that instruction to stay away from newspapers, radio, television and websites; and not engage in discussions about the case. In some situations, however, we must acknowledge that prejudice cannot be remedied. In *Kirby v. Rosell*, for instance, an Arizona court held that extraneous material considered by the jury may be deemed prejudicial without proof of actual prejudice if it relates to the issues of the case and there is a reasonable possibility of prejudice. *Kirby v. Rosell*, 133 Ariz. 42, 648 P.2d 1048 (Ariz. App. 1982). There could be no greater prejudicial presentation of extraneous information than has now occurred in Steve DeMocker's case. "Withdrawing the death penalty from their consideration now will create confusion, anxiety and conjecture about what must have happened for the state to back away from

pursuing a sentence of death. There is a grave risk that the internal narrative explanation they will construct will lead them to suspect that Mr. De Mocker did something, admitted something or provided the prosecution with level of cooperation (acceptance of guilt) that would cause them to now seek this much lower level of punishment." See Attached Declaration of Joe Guastaferro at ¶5.

In this case, the extraneous information came from the Court and from counsel—counsel for both the State and the defendant. Indeed, the voir dire process was organized around the presentation of critical information we now deem not only extraneous but improper. During the voir dire process, the jurors in the pool were told multiple times by both the Court and counsel that the case is a capital case, that if selected as a juror, they could be hearing three separate trials, using different burdens of proof and making different kinds of judgments. Potential jurors in this case each completed an 18 page, 95 question jury questionnaire, the last 19 of which focused exclusively on the death penalty. Prior to filling out the questionnaire, the panel listened to a video from the Court explaining the capital jury process. See Attached Declaration of Guastaferro at ¶ 6 and 7.

When the jurors were called into the courthouse, the Court then explained in person again during voir dire the process of a capital trial, and the concepts of mitigation and aggravation. The Court went to great pains to distinguish this case from the typical criminal case. The Court explained that in a usual case, jurors were instructed not to concern themselves with punishment whatsoever, in a capital trial the jurors must be examined about their views of the death penalty before trial because they might have responsibility participate in making the life or death punishment decision. (*Id*). The death penalty, mitigation, aggravation, and the process of a capital trial having been explained by the Court in a video and in person, the parties were then given the opportunity to follow up in detail on the jurors answers about the death penalty. In

virtually every individual voir dire exchange, the prosecution explained that as a juror he or she might be considering aggravating evidence of pecuniary gain and that the day could come when each juror might be required to look at mitigating evidence—evidence about the life history, family relationships, and about his prior life as and father of two daughters. They were asked whether they could assure us that they would consider all such evidence as part of being a "fair and unbiased juror."

Mr. DeMocker's defense team tried insofar as it was able to explore all of these aspects of punishment. None of the information we presented at that time was "extraneous." To the absolute contrary, the information was critically relevant information to impart in a capital case. It may be possible to imagine a juror ignoring an instruction to disregard information heard in error. It is not possible to imagine asking a juror to forget instructions delivered by the Court and repeatedly underscored by counsel. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (internal citations omitted). "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). "The jurors we spoke to left their discussion with the Court and the parties certain that this was a death penalty case and that it would place unique demands on them if they were chosen to serve." See Attached Declaration of Joe Guastaferro at ¶7. Certainly, the usual admonition to jurors that they are "not to concern themselves with punishment" will produce massive confusion. If the Court goes one step further and tells the jury panel that it is not to concern itself with "why they are no longer to concern themselves with punishment" we guarantee juror speculation. (*Id.* at ¶8 and 9). If this pool who has heard these

explanations multiple times by multiple authorities is actually the pool from which a jury is selected in this case, they will not understand why the Court has suddenly changed the rules and law to be applied. (*Id.*)

The Court repeatedly told the jurors that their opinions would be respected but that they must speak to the court and counsel with "painstaking honesty." Repeatedly, the prosecution and sometimes the DeMocker defense, underscored that request for each individual juror to be painstakingly honest with the court and counsel. Why? Because of the importance of the role we have envisioned for them in this death penalty case. If the Court now tells the jury simply that the case is no longer capital, the jurors will necessarily wonder and speculate about why the change occurred and why their often difficult voir dire discussions with the Court and counsel have been so quickly rendered so irrelevant that they must do all they can to forget that they ever occurred. How could they not wonder how this might have happened? Is this the result of some conduct by or admission from Mr. DeMocker? Is it some sanction against the State for misconduct? Is there now evidence that was once only days ago deemed relevant that they will never hear? This potential speculation taints the jury and will inescapably cause them to consider information received during voir dire or from their own imaginations about why the rules have changed.

The prejudice to Mr. DeMocker is obvious. If jurors are left to wonder why the process changed so late in the jury experience, without explanation, they may make any number of assumptions about why. (*Id.*) They may also determine that Mr. DeMocker has already received leniency from the State and this may effect their evaluation and weighing of the evidence and their likihood of conviction. Mr. DeMocker is entitled to a jury that is not tainted by all of this irrelevant and prejudicial confusion and speculation caused by a capitally qualified, non-death penalty case.

3. Counsel Will Have Been Rendered Ineffective in Conducting Non-Capital Voir Dire

The Sixth Amendment guarantee of right to counsel entitles a defendant to "effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). The guarantee of an impartial jury necessarily rests upon an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). The other purpose of voir dire by both the trial court and the parties is to provide the parties with the information needed to exercise both peremptory challenges and challenges for cause. Ariz. R.Crim. P. 18.5(e); *State v. Chaney,* 141 Ariz. 295, 304, 686 P.2d 1265, 1274 (1984). Indeed, the trial court does not have the discretion to deny a defense counsel's request to conduct additional voir dire to discover information relevant to such challenges under Rule 18.5. *State v. Anderson,* 197 Ariz. 314, 320-21, ¶ 14, 4 P.3d 369, 375-76 (2000).

Mr. DeMocker also has a basic due process right to understand the ramifications of his strategic decisions. A defendant is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy will have on the subsequent capital sentencing, the results of which may be equally if not more critical to the defendant than the conviction itself. See *Coleman v. McCormick*, 874 F.2d 1280, 1288 (9th Cir. Mont. 1989). Where a defendant was given no notice whatsoever of the life and death consequences of his actions in defending himself against the State's prosecution before and during trial, his right to notice and to fair warning of the conduct that impacts upon his liberty is a basic principle long recognized by the Supreme Court. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 350-51, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed.

682 (1948). Because Mr. DeMocker had no reason to suspect that his decisions to conduct a capitally focused voir dire could come back to haunt him later when the State changed the charges to a non-capital charge, he was denied due process. See *Coleman* 874 F.2d at 1288 (finding a denial of due process where a defendant was not advised that his trial strategy may be used against him at sentencing in a death penalty case.

Counsel's approach to voir dire in this case has been almost entirely focused on the fact that the case was a death penalty case and on determining the death penalty views of the potential jurors. Counsel made strategic decisions about what to ask and what not to ask based on the understanding that this was a capital case. "A death penalty case is driven, as was mentioned, by the need to assess views on capital punishment and receptivity to mitigation." See Attached Declaration of Joe Guastaferro at ¶14 and 10. Counsel agreed to excuse jurors based solely on the fact that they were likely *Witherspoon* excludable. As mentioned above, counsel reviewed the over 300 initial questionnaires and created a list of 142 people that we recommended for cause challenges primarily because of their views on the death penalty. There are approximately 15 of these people who were never considered for the pool. If the death penalty were not an option, these people of conscience would be in the mix. Had jurors not been evaluated on death penalty criteria alone, they might have been able to sit on this jury. Many had a strong "law and order" sense that would have possibly made them hold the State's feet to the fire regarding the presentation of proof beyond a reasonable doubt in the guilt phase.

The Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), articulated the standard for determining whether a prospective juror in a death penalty case must be excluded for cause because of his or her view on capital punishment as "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.*

at 424, 105 S.Ct. 844 (quotation marks omitted). Based on the State's decision to strike the death penalty, all the strikes for cause in this case were wrongly directed where they were based on a jurors inability to impose the death penalty.

The DeMocker defense team did what we would urge any death penalty lawyers to do. We set out to conform our conduct at this stage of the case to what the best consultants, teachers, and writers have told us is the essential approach for jury selection—a process unique to death penalty voir dire. We retained a nationally known and widely respected jury consultant to guide us through this process and to help us understand which jurors should be struck and which ones saved for jury service. Mr. Guastaferro and others in his field have come to appreciate the unique aspects of capital jury selection. How does a lawyer defending a client deemed innocent by the Constitution and the Court talk to jurors about the punishment of death? It is a skill not naturally found in criminal defense lawyers or in prosecutors or courts.

People like Professor Michael Tiger are asked to make presentations at judicial conferences to help judges understand the unique aspects of this process. Considerable money is paid by federal, state and local jurisdictions to train prosecutors and defense lawyers to do this work. Within the last few months hands-on training seminars and workshops have been held for prosecutors and separately for defense lawyers here in Arizona. We are certain that in every one of those presentations—on both sides of the aisle—lawyers were told that what might constitute "competent" lawyering in a typical criminal case will not be deemed "competent" in a death penalty case. It would have been error arising to the level of misconduct had any lawyer in this courtroom told any juror, "you are not to concern yourself with possible punishment in this case." A recitation of the usual RAJI would have been simply and entirely incorrect and misleading. Instead, every lawyer in this case and every lawyer across the State and the

county are taught the minimal tools necessary for capital voir dire must be focused first and foremost on talking to jurors about punishment.

Lawyers—again, prosecutors and defense alike—are taught that they must prioritize whatever time is allowed in the voir dire process to assure that the fullest examination time is reserved for the discussion of the death penalty. On both sides, time after time, the central focus was death.

Mr. DeMocker's lawyers provided a defense at the voir dire stage that can only be deemed massively ineffective. Counsel's actions during voir dire are presumed to be matters of trial strategy. *Fox v. Ward*, 200 F.3d 1286, 1295 (10th Cir. 2000). Under the usual two-part analysis taken from *Strickland v. Washington,* 460 U.S. at 687, we suppose one could argue that our conduct did not fall below the objectively reasonable standards for competent counsel. After all, there is likely not another case anywhere in which death was removed as an issue *between voir dire and the beginning of trial.* While the novelty of the event may save us from a certain finding of ineffectiveness, nothing softens the conclusion that the defendant has been massively prejudiced by our conduct. We inquired repeatedly, intrusively, and in detail about the most private views of Mr DeMocker's fellow citizens in this County. We talked to an extent that always seemed painful to Mr. DeMocker and often must have irritated the Court about punishment and about the relevance of a life well led. We spoke less, and often ignored entirely, a host of subjects that would otherwise have dominated the voir process. For instance, we certainly would have responded in tit for tat detail to the prosecutor's version of the DNA and circumstantial evidence. We would have focused on the exculpatory DNA issues in this case and potential CSI effect rather than merely acquiescing to the State asking potential jurors if the lack of DNA would prejudice them against the State's case. We would have been focused on reasonable doubt and about the other aspects of the case from which doubt might arise. Little of that happened.

Why? Competent counsel was required to focus first and often nearly exclusively on death. See Attached Declaration of Guastaferro at ¶13-16. ("Inquiry into the life circumstance of the juror, the experiences in their lives that led them to develop into the person before us is severely truncated because of the time needed to explore what the possibility of voting for death means to them.") ("In a non capital case defense lawyers can more effectively discuss with jurors in a broad way the legal principles of Burden of Proof, Proof Beyond a Reasonable Doubt and Presumption of Innocence. In a capital trial, these essential principles are discussed only in the context of arriving at the appropriate punishment.")

4. This is a Case of First Impression

In the few hours we have had since yesterday's announcement of the State's decision to dismiss the death penalty, we have been unable despite considerable effort to find a similar case. The few cases found or mentioned by this Court or the State are plainly inapposite.

Buchanan v. Kentucky isamong them. *Buchanan v. Kentucky*, 483 U.S. 407, 107 S. Ct. 2906 (1987). In *Buchanan* the Supreme Court held that a non-capital defendant who was changed as a co-defendant of a capital defendant was not unconstitutionally subjected to a death qualified jury. In that case, however, as distinct from here, the jury in *Buchanan* was not capitally qualified as to Mr. Buchanan. This is a fundamental and significant difference. The jury for Mr. Buchanan was not told that it would one day consider the death penalty against Mr. Buchanan, that it would one day consider aggravation and mitigation relevant to Mr. Buchanan, had the potential mitigation and aggravation described in part and then suddenly told, "never mind". Indeed, insofar as we can tell from the opinion, the jury was properly instructed as to Mr. Buchanan.

Likewise, the Eighth Circuit decision in *McDowell v. Leaply*, 984 F2d 232 (1993) does not answer our question. *McDowell* is a federal habeas decision reviewing

a South Dakota state court conviction. In that case, the jury was sworn and the defendant had been convicted prior to the State's decision to dismiss the death penalty. In that case, the court's only alternative would have been to declare a mistrial and vacate the jury finding or to allow the conviction to stand. The Court in *McDowell*, using the federal habeas standard requiring extreme deference to state court findings and placing the burden on the petitioner to "establish by convincing evidence that the factual determination of the state court was erroneous", merely held that the petitioner was not entitled to relief. Pivotal may be the right way to describe the difference between this case and *McDowell.* The jury went through the trial at least arguably without the baggage of a false understanding of its role. The inescapable juror confusion at the very outset of our case is missing from that case.

Counsel can find no case where a jury pool has been capitally qualified, but not yet sworn, the death penalty is dismissed, and yet the defendant is forced to proceed on the new non-capital charges with the same death qualified jury. It defies common sense and all social science research to suggest that the difference between a capitally qualified jury and a non-capitally qualified jury is insignificant for purposes of guilt and innocence. For these differences to be ignored in the interests of form or substance or wholly out of economic concerns is offensive to all notions of a fair and impartial jury.

Defense counsel communicate frequently with lawyers in Arizona and around the country who teach and monitor cases in this field. We have also been blessed to have a jury consultant who has been involved in as many high profile criminal cases as any person we are likely to meet. Neither Mr. Guastaferro nor anyone with whom we have communicated by email or telephone in the last hours has been able to point us to a single case in which this situation has occurred, i.e., death being eliminated after voir dire but before the commencement of trial. Among the things that might fairly be done

in such a case, certainly no one we can identify has ever concluded that simply instructing the jury to forget what they were schooled on for days is the right solution.

The State made a last minute decision to drop the death penalty after voir dire but before the jury was sworn. We think it important for the Court to know, and for counsel for the State to be reminded, of what happened here. The first inkling that a decision to dismiss might be considered occurred last Friday afternoon. We all agreed that it would be foolish for anyone to take any action diverting attention from the many tasks at hand. Interviews, motion practice, trial preparation had to continue unabated. But, as the State was informally discussing dismissing the death penalty with the defense in the days before May 26, the State indicated that it fully agreed that a new jury would be required if the death penalty were dismissed now on the even of swearing a jury.

On the morning of May 26, the State had a sudden about face on the issue of whether a new jury is required. To follow the State's logic would permit the State to charge a case capitally, go through the entire capital voir dire process that it knows will produce a jury more likely to convict, and then, at the last minute, drop the death penalty. This would permit the State to have a capitally qualified jury in a non-capital case simply by its own manipulation of the process. The State has not explained its decision to dismiss the death penalty in this case and the defense is aware of no change in circumstance since the commencement of voir dire. Whether it is the result of intentional manipulation or simply bad luck for Mr. DeMocker in the State's timing, the group of people who will decide Mr. DeMocker's fate should not be so easily toyed with by the State. Mr. DeMocker is entitled to a jury that has not gone through the misleading, confusing, death-prone qualifying process when he does not face a capital murder charge.

5. Considerations of Time and Cost

One disturbing impression arising from yesterday's discussions with Court and counsel was the suggestion that this jury should be kept and re-instructed in order to save money or time. To whatever extent these considerations of judicial resource efficiency weigh in the Court's balance, it may be well to point out that the balance of time and expense will weigh heavily in favor of dismissing this panel and beginning anew. We do not even pause here to consider the time and costs associated with the applications for stays and the litigation of a special action on this issue. We have just endured one special action that was close to frivolous and we are quite mindful of the time and expense to counsel associated with that undertaking, but the real costs here will weigh time of trial, appeal and retrial in the event this stratagem succeeds against the wisdom of fixing the obvious problem today.

Noncapital jury selection can be accomplished competently and expeditiously. We, as much as the Court and the State, want to have this case move forward in the time already allotted. That is certainly the case on our side as long as Mr. DeMocker remains in custody isolated from his family. It is hard to imagine that by some day next week we cannot be well into if not through with a new jury selection process. We would recommend taking a little more time than that, and to carefully think through the need for a different form of a much shorter questionnaire, but the process can be conducted with dispatch.

The ultimate time that jurors need to set aside will certainly be substantially less. Whatever the length of the guilt-innocence trial, the absence of a role as a fact-finder for sentencing purposes will reduce the projected time of jury service significantly. If convicted, the sentencing phase can be conducted by the Court as that important work is typically done, i.e., with the expenditure of time and involvement of other personnel over the ensuing months.

We make these observations and at the same time we must candidly reflect on the limitations of our own understanding of what might happen as this case proceeds as a noncapital case. We cannot foresee today with certainty whether there might be a role for the jury at the end of this process. The announcement that the State hopes to have the jury consider lesser included offenses like second degree murder may well complicate this picture. The *Ring* implications of all of this are unexplored and largely unknown to us today, but it has always been true that "death is different." Without death on our shoulders every day, this trial may and will proceed in ways that we might not otherwise have envisioned.

CONCLUSION

For these reasons and any adduced at the hearing on this matter, and pursuant to Mr. DeMocker's rights to due process, equal protection, counsel, a fair trial and appeal, freedom from double jeopardy, and freedom from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under the Arizona Constitution, Article 2, Sections 1, 2, 3, 4, 8, 10, 11, 13, 15, 24, 32 and 33. Mr. DeMocker requests that the Court to dismiss the death qualified jury and call a new venire panel for voir dire on the new non-capital charges.

RESPECTFULLY SUBMITTED this 27TH day of May, 2010.

By: _____

John M. Sears
P.O. Box 4080
Prescott, Arizona 86302

OSBORN MALEDON, P.A.
Larry A. Hammond
Anne M. Chapman
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
Attorneys for Defendant

ORIGINAL of the foregoing hand delivered for filing this 27th day of May, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered this this 27th day of May, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
Yavapai Courthouse Box

3139079

DECLARATION OF JOE GUASTAFERRO

Joe Guastaferro, under penalty of perjury, declares the following:

1. I am a jury consultant.

2. Since the seminal work, "Reconstructing Reality for the Courtroom" [Bennett and Feldman, Rutgers University Press; 1981] there has been a body of research analyzing how jurors use narrative story-telling techniques to both comprehend complex factual information and to rationalize decision-making to avoid "decision regret." Few people enjoy making decisions which are complex cognitive tasks. The more important the decision the greater the dislike. There are advantages and disadvantages in all choices that cause decision-makers to experience an uncomfortable dissonance.

3. When real jurors deliberate on trials with consequential outcomes narratives emerge as frequent tools of argumentative communication. The research of Feldman and Bennett show that evidence presented at trials, as well as verdicts, can best be evaluated by viewing trials as stories. Subsequent research examining the deliberative talk of real jurors reveals the emergence of spontaneous, counterfactual story-telling in naturally-occurring jury decision-making in criminal trials [Dr. Sunwolf. "Telling Tales in Jury Deliberations: Jurors use of fictionalized and factually based story telling." Paper. National Communications Association , Chicago, 1999.]

4. In deliberations jurors engage in fictional and non fictional story telling to 1) comprehend complex information and 2) to avoid the personal anxiety of making difficult decisions and post decision regret. Throughout the jury selection process in the case of State of Arizona v. Steven DeMocker, we have enjoined the jurors to be "painstakingly honest" with us in exploring what might be the most difficult decision they would ever have to face: deciding if a man lives or dies. The court and the parties repeatedly assured jurors that "these are difficult questions" and that "these issues are not something that most people ever think about." The anxiety connected to such a momentous decision for many of the jurors who have been qualified and who comprise the "strike pool" is palpable.

5. In our discussions with prospective jurors we provided a smattering of facts about the case with the promise that they would hear more later. This sampling of the facts is just enough for them to begin compiling the narrative that would help them piece together "what must have happened" and to create for them the expectation that the crime must have been of a horrendous nature to prompt the state to pursue the most serious penalty in its arsenal of punishments. It was impressed upon these jurors that the most significant aspect of serving on a death penalty jury is that they, the jury, not the court, would decide whether to impose the penalty. Withdrawing the death penalty from their consideration now will create confusion, anxiety and conjecture about what must have happened for the state to back away from pursuing a sentence of death. There is a grave risk that the internal narrative explanation they will construct will lead them to suspect that Mr. De Mocker did something, admitted something or provided the prosecution with level of

cooperation (acceptance of guilt) that would cause them to now seek this much lower level of punishment.

6. The jurors in our pool completed an extensive questionnaire that both sides and the court collaborated on. Nineteen questions were designed to capture their views on the death penalty and to sound out their understanding of the concept of mitigation. It would be naïve to assume that such targeted questions did not plant the idea in the prospective jurors mind that 1) the consequences of the decision they would have to make are extremely consequential and 2) that the force behind exploring these areas was to instill in their minds the seriousness of decision which might impose society's ultimate sanction. It is important to note that the prospective jurors were given an opportunity to make a selection which indicated that they did not understand how mitigation concepts applied. Many of them checked that box alerting the court and the parties to the possible confusion that might exist about this crucial part of a capital trial. Now, with the death penalty withdrawn, we will tell jurors that their confusion is no longer a concern. More importantly the time spent with them trying to clear up their confusion might have been more productively spent on determining their attitudes toward other aspects of the case.

7. Courts throughout the country have stated, restated and echoed the mantra that "Death is Different." Jury selection is the first phase of the trial where jurors become aware of this difference. In addition to the questionnaire which, by report, took the jurors hours to fill out was followed by individualized, one on one, voir dire to reinforce this difference. The record will certainly show the Court and lawyers from both sides spent time detailing the unique "sentencing scheme" of a death penalty case. The Court read a lengthy statement detailing the phases of a death penalty trial. The prosecution and the defense repeated the sentence-decision structure in detail using different metaphors and analogies to impress upon the jury that they would only consider the death penalty if certain steps were followed and decisions at each phase were decided in a certain way. The jurors we spoke to left their discussion with the Court and the parties certain that this was a death penalty case and that it would place unique demands on them if they were chosen to serve.

8. The jurors we spoke with were told what their responsibility as jurors in this unique type of case would be and how it differed from the role of other jurors who served in cases where death was not an option. They were told that to reach their decision, they would be asked to consider that the crime with which Mr. DeMocker is charged was committed for pecuniary gain which was the single aggravating circumstance that elevated this crime to the level of a death case. They were also told that to mitigate against the aggravating circumstances they would be asked to consider the background of Mr. DeMocker including his relationship to his family, his children and aspects of his personal life that would never enter into any other deliberative process. Now, we will attempt to "un-ring that bell" and tell them that they are no longer to consider those things and focus only on the crime.

9. It is not difficult to see that jurors would see the trial, now that death has been removed from consideration, as one about a less serious offense. It is not difficult to see how they could easily conclude that life in prison is a lesser punishment and impose a guilty verdict

with the belief that Mr. DeMocker was "getting a break" from the original consequences he faced. Several prospective jurors stated that they would have to "live with themselves" after reaching a verdict to impose death. Now with death no longer under consideration, jurors can reduce their personal anxiety by imposing a less severe sentence in a less soul searching and conscientious way.

10. As a jury consultant for the past 28 years, who has worked almost exclusively in the criminal arena and only with the defense, I am profoundly aware of the difference in approach and strategy defense teams employ in death and non-death cases. Most significantly in non-capital cases the defense team does not spend countless hours designing, researching, documenting and arguing in court for an extensive system of jury selection that has one primary goal; a life verdict. I worked closely with this team designing the system they presented and persuaded the court to adopt. The Court will remember that it allowed me in December of 2009 to participate in a hearing to discuss the merits of the procedure we were proposing. That entire, elaborate system was conceived with one thought in mind; to find jurors who would fully comprehend the weight of serving on a panel that could impose death.

11. The most significant paradigm shift is that in non capital cases considerable effort has to be spent to assure the Court and the defendant that the jurors will not consider sentencing. "What happens to the defendant" is totally and completely outside consideration of the panel. In capital jury selection the exact opposite is true and the Court and the parties extend considerable effort to make certain the juror abides by the law and knows that it is her vote that could send a person to death.

12. While it is not the best practice, lawyers in non-death penalty cases will sometimes forgo the use of a juror questionnaire. In this case, as was mentioned, the jurors completed an extensive questionnaire which required hours to analyze and rank to primarily assess one thing; the prospective juror's views on the death penalty. Information on the juror's background and personal interests takes a back seat to the driving motivation of finding jurors who would be capable of the personal, moral assessment required to consider whether the state should kill a fellow citizen.

13. In a non-death case, voir dire is often conducted in a group setting which has decided advantages over individual voir dire. In a death penalty case, individual voir dire reduces the possibility of tainting the entire pool with views and attitudes, both for and against, the death penalty. Individual voir dire also allows for more candor and confidentiality of the jurors deeply held, core beliefs about the ultimate punishment. Group voir dire allows the defense to assess interactions between jurors and strategize in part based on group dynamics they project will be at work in deliberations.

14. In approaching a non-death case, defense teams can, albeit indirectly, sound out the panel on their theory of defense. A death penalty case is driven, as was mentioned, by the need to assess views on capital punishment and receptivity to mitigation. Inquiry into the life circumstance of the juror, the experiences in their lives that led them to develop into the

person before us is severely truncated because of the time needed to explore what the possibility of voting for death means to them.

15. In a case loaded as this one is with forensic testimony, science and what could be "junk science" the defense would be able to develop more questions to explore the existence of the "CSI Effect" with potential jurors. Most people mouth the response that they "don't believe everything they see on TV" yet there is a growing body of research in popular culture indicating that people substitute movie and TV reality for their own. Asked if they have ever had a negative experience with law enforcement a person might respond, "No but I saw a TV show about it." [Richard K. Sherwin; "When the Law Goes Pop"]. There is a controversy over the existence of the CSI Effect yet both sides of the argument agree that jurors need to be questioned extensively about it and reminded of their constitutional responsibilities is evaluating evidence.

16. In a non capital case defense lawyers can more effectively discuss with jurors in a broad way the legal principles of Burden of Proof, Proof Beyond a Reasonable Doubt and Presumption of Innocence. In a capital trial, these essential principles are discussed only in the context of arriving at the appropriate punishment.

On May 27, 2010, I declare under penalty of perjury that the matters set forth herein are true and correct.

Joseph V Guastaferro

JOE GUASTAFERRO

3139990